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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GENERAL MOTORS CORPORATION, ***Petitioner***

v.

EVERT ROMEIN, ET AL., ***Respondents***

FORD MOTOR COMPANY, ***Petitioner***

v.

ARTURO GONZALEZ, ET AL., ***Respondents***

On Writ Of Certiorari
To The Supreme Court Of Michigan

BRIEF FOR THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., AND THE MICHIGAN MANUFACTURERS ASSOCIATION AS AMICI CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Amici will address the following question:

Whether the Contract Clause of the Constitution should be interpreted according to its literal terms, as a strict prohibition against legislation impairing the obligation of contracts.

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INTEREST OF THE AMICI CURIAE

The Motor Vehicle Manufacturers Association of the United States, Inc., (MVMA) is a nonprofit membership association composed of companies engaged in the manufacture of motor vehicles in the United States. The members of MVMA are Chrysler Corporation, Ford Motor Company, General Motors Corporation, Honda of America Manufacturing, Inc., Navistar International Transportation Corp., PACCAR, Inc., and Volvo North America Corporation. The Michigan Manufacturers Association (MMA)

is an association composed of 2,665 private Michigan employers. It is organized to study matters of general interest to its members, to promote the interests of Michigan employers and of the public generally in the proper administration of laws relating to its members, and otherwise to promote the general business and economic welfare of the State of Michigan. Both MVMA and MMA have often represented the interests of their member companies in administrative and judicial proceedings.

This case presents important questions concerning the power of state governments retroactively to alter the obligations of employment contracts and, by extension, all contracts. MVMA's member companies employ over 715,000 workers in the United States. MMA's members employ over 1,000,000 workers in a variety of industries. Amici therefore have a strong interest not only in the outcome of this case but in the effect that the Court's decision in this case will have on the future development of the law governing states' power retroactively to impair contractual obligations.[1]

SUMMARY OF ARGUMENT

A. As currently interpreted, the Contract Clause imposes only limited restraints on state governments. Michigan's 1987 amendment to its workers' compensation laws is irreconcilable even with the current Contract Clause standards; indeed, the 1987 amendment is in many respects a core example of a violation of the Contract Clause. This case, however, also furnishes the Court an opportunity

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk.

to establish that current Contract Clause standards have eroded too far, and that the Clause should be interpreted more strictly, according to its language and the original understanding.

The language of the Contract Clause is unequivocal: "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." The Contract Clause appears in the provision of the Constitution (Art. I, § 10, Cl. 1) that contains the most fundamental restrictions on the powers of the states found in the pre-Civil War Constitution. Within that provision, the Contract Clause is conjoined with the Ex Post Facto Clause and the Bill of Attainder Clause—two fundamental guarantees of the rule of law. For the first 150 years of the Republic, the Clause was interpreted strictly, in accordance with its terms. That strict enforcement is generally recognized to have been highly beneficial to the Nation's economy.

Under current law, however, many abrogations of contract rights are not deemed "impairments." Moreover, contrary to the explicit language of the Clause, even an acknowledged impairment will be upheld if it satisfies open-ended criteria of "reasonableness" and "appropriateness" and if the state interest outweighs the "severity of the impairment." Such a lenient interpretation of an explicit, unequivocal constitutional command has never been adequately justified.

B. The history of the drafting of the Contract Clause shows that the Framers intended it to be interpreted strictly. Indeed, in the debates at the Convention and elsewhere, opponents of the Contract Clause offered precisely the arguments that are now advanced for interpreting the Clause "flexibly." The Framers rejected those arguments and wrote a Clause phrased in unequivocal terms.

Moreover, the history of the Clause shows that the Framers did not see it simply as a protection of property rights. Instead, they believed that the Contract Clause, like the Ex Post Facto Clause, reflected a fundamental requirement of fairness between the government and its citizens.

C. The evolution of Contract Clause doctrine shows that the current standards are not the result of a considered judgment by the Court that strict enforcement of the Clause would be harmful or unworkable. Instead, the erosion of the Contract Clause is the result of an unreflective series of decisions that, wholly unjustifiably, associated the Contract Clause with the utterly different notion of economic substantive due process. Properly understood, the Contract Clause is in no sense a general barrier to state regulation, any more than the Ex Post Facto Clause is a general barrier to state criminal law enforcement. Rather, the Contract Clause is an unequivocal constitutional guarantee, rooted in values of fairness and stability, that should be interpreted in accordance with its language and intent.

ARGUMENT

THE CONTRACT CLAUSE SHOULD BE INTERPRETED TO PROHIBIT LEGISLATION THAT IMPAIRS CONTRACTUAL OBLIGATIONS IN ALL BUT THE MOST COMPELLING CIRCUMSTANCES.

A. The Language And Structure Of The Constitution Require That The Contract Clause Be Interpreted As A Strict Prohibition Against Impairing The Obligations Of Contracts.

As currently interpreted, the Contract Clause imposes only limited restraints on the power of state governments. Amici agree with petitioners that Michigan's 1987 amendment to its workers' compensation laws transgresses even those limits. Indeed, in many respects the 1987 amendment is a paradigm example of legislation that violates the Contract Clause. The 1987 amendment is not a general police power regulation that happens to have an incidental effect on settled obligations. Compare *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 191 (1983) (upholding a measure affecting contract rights on the ground that it "applied to all oil and gas producers, regardless of whether they happened to be parties to . . . contracts"); *Stone* v. *Mississippi*, 101 U.S. 814 (1880) (upholding a state constitutional provision that incidentally invalidated already-issued lottery tickets, in the course of prohibiting all lotteries). Rather, the 1987 amendment is legislation targeted specifically on settled obligations; as Justice Griffin noted in his opinion below, it was "deliberately designed to disrupt retroactively past transactions" (Pet. App. 50a). The state's only justification for the 1987 amendment is simply that the state thought it would be advantageous to readjust contractual rights retroactively. And the 1987 amendment is designed to benefit a narrow group, not the public generally. A statute of this kind—narrow legislation designed specifically to disrupt contractual expectations solely be-

cause the state seeks to capture some political advantage by doing so—constitutes a core violation of the Contract Clause.

As associations of manufacturers with large numbers of employees and extensive commercial dealings, however, amici are concerned not just about this case but about the larger picture as well. Although the judgment of the Michigan Supreme Court should be reversed even under current Contract Clause standards, this case provides the Court with an occasion to consider whether those standards should be revised.

The Contract Clause "was perhaps the strongest single constitutional check on state legislation during our early years as a Nation." *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 241 (1978). During the last half-century, however, this Court has invalidated only two statutes (and only one statute regulating contracts between private parties) under the Contract Clause. *Allied Structural Steel, supra*; *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977).

This dramatic erosion of the Contract Clause has never been adequately justified. The text of the Contract Clause is unequivocal. Nothing in the history of the framing of the Clause suggests that the needs that animated it have disappeared; on the contrary, the Framers anticipated, and were not persuaded by, the very arguments that have today been accepted as reasons for relaxing the limits that the Clause imposes on the states.

Ultimately, Contract Clause doctrine today appears to be the product of the unreflective association of the Contract Clause with the discredited notion of economic substantive due process, a notion that led to the invalidation of much state regulatory legislation in the first third of

this century. See, *e.g.*, *Lochner* v. *New York*, 198 U.S. 45 (1905). As we explain below, this association is unwarranted, and there is no reason why the Contract Clause should not be applied today in the terms in which it was written—as a strict rule that contractual obligations are not to be impaired, at least absent the most compelling circumstances. Amici therefore suggest that the Court take this opportunity to establish that the Contract Clause should be interpreted in accordance with its language and history.

1. The Contract Clause provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." Under current doctrine, however, even a state law that explicitly abrogates contractual rights may not qualify as an "impairment" within the meaning of the Contract Clause. In particular, states have been allowed great latitude to alter the contractual obligations of any firm in a "heavily regulated industry." *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 413 (1983), citing *Veix* v. *Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38 (1940). In a period when regulation was the exception rather than the rule, this limitation on the Contract Clause might have been appropriate. But today there are few industries that are not heavily regulated in many respects, ranging from the securities they issue to conditions on the workplace floor, from the safety of the products they produce to their employees' pensions. Thus even this threshold limitation has the effect of severely reducing the coverage of the Contract Clause.

Once an "impairment" is found, the Contract Clause is unequivocal in its terms: it flatly forbids "any . . . Law impairing the Obligation of Contracts." Notwithstanding this explicit language, under current doctrine an acknowledged "impairment" of contractual obligations can be up-

held with such ease that this Court has found it necessary to caution that the Contract Clause "is not a dead letter." *Allied Structural Steel*, 438 U.S. at 241.

In determining whether an impairment is justified, current doctrine requires that the legislation satisfy three conditions: It must promote "a significant and legitimate public purpose"; it must be " 'based upon reasonable conditions' "; and it must have " 'a character appropriate to the public purpose.' " *Energy Reserves Group*, 459 U.S. at 411-12, quoting *United States Trust Co.*, 431 U.S. at 22 (brackets omitted). These standards are unjustifiably flexible. It is all too easy for litigants to adduce some "significant and legitimate public purpose" that legislation supposedly serves. Similarly, the requirements of "reasonableness" and "appropriateness" are highly open-ended.

Moreover, some of the Court's decisions have suggested that in applying these criteria, the courts should adopt a balancing test under which "[t]he severity of the impairment" will determine "the level of scrutiny to which the legislation is subjected." *Energy Reserves Group*, 459 U.S. at 411. Finally, even in applying these lenient standards, the courts are to be "defer[ential] to [the] legislative judgment" in cases (like the instant case) in which the contract is between private parties, rather than between a private party and the state. *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 505 (1987).

2. The text and structure of the Constitution alone reveal how problematic this interpretation of the Contract Clause is. The Contract Clause appears in Article I, Section 10, Clause 1 of the Constitution, which, in its entirety, provides:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Until the Fourteenth Amendment was adopted, this provision was "the primary constitutional check on state legislative power" (*Keystone Bituminous Coal Ass'n*, 480 U.S. at 502). Even the provisions of the Bill of Rights, of course, applied only to the federal government. *Barron* v. *Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). The provisions of Art. I, § 10, Cl. 1 were, therefore, the restrictions that the Framers of the Constitution thought were the most fundamental and important limitations to impose on the states.

The importance of the other restrictions in Art. I, § 10, Cl. 1, is self-evident. The first two restrictions—on entering into treaties and issuing letters of marque and reprisal (which in effect is the power to initiate hostilities)—secure the power of the federal government to conduct foreign relations. The next three prohibitions in Clause 1—against coining money or issuing currency—are the domestic equivalent: they establish that national economic policy will be set by the federal government. The prohibitions against bills of attainder and ex post facto laws—prohibitions that are specifically joined with the Contract Clause—reflect the basic requirements of fair play and the rule of law between the government and citizens.

One would expect that prohibitions so central to the constitutional scheme would be strictly enforced according to their terms. No one would suggest that a state may enact an ex post facto law or a bill of attainder if such a law

is "reasonable" and "appropriate" and promotes "a legitimate public purpose." See, *e.g.*, *Miller* v. *Florida*, 482 U.S. 423 (1987); *United States* v. *Lovett*, 328 U.S. 303 (1946). No one would suggest that the courts should defer to a state legislature's judgment in determining whether a state may issue paper currency or conduct foreign relations. Only the Contract Clause "is not to be read literally." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 502.

3. When the Framers wanted to place only a qualified restriction on the power of the states, as opposed to the absolute restrictions of Art. I, § 10, Cl. 1, they of course knew how to do so. The very next clause of the Constitution provides that no state may "lay any Imposts or Duties on Imports or Exports, *except what may be absolutely necessary for executing its inspection Laws*." Clause 3 of Art. I, § 10 also contains a qualified limit on the power of the states: it provides that "[n]o State shall, without the consent of Congress, . . . engage in War, *unless actually invaded, or in such imminent Danger as will not admit of delay*." Clause 2 of Art. I, § 9 prohibits the suspension of the writ of habeas corpus "unless when in Cases of Rebellion or Invasion the public Safety may require it." But Clause 1 of Art. I, § 10 is unqualified. See also *Chicago Bd. of Realtors* v. *City of Chicago*, 819 F.2d 732, 744 (7th Cir. 1987) (Posner, J., concurring): "Imagine what freedom of speech would have come to mean if the Court had interpreted the First Amendment—which is no more absolute in its language or clearcut in its history than the contract clause—as loosely as it now interprets the contract clause."

Of course, like any constitutional provision, the Contract Clause is subject to interpretation. There will be instances in which reasonable people can differ over whether a particular measure constitutes a "Law impairing the Obligation of Contracts," just as there can be reasonable disagreements over whether a particular measure constitutes an ex post facto law or a bill of attainder. But the deferential approach that current law takes to the Contract Clause is simply not warranted for a constitutional guarantee that is so unequivocal, and that occupies such an important structural position in the Constitution.

4. Perhaps for this reason, commentary on the Contract Clause has been virtually unanimous in criticizing the current standard and urging a more strict interpretation of the Clause. A consistent theme among the commentators is that many recent decisions—unlike the Contract Clause cases of the last century—do not treat the Clause with the rigor that is appropriate for a specific constitutional provision that is phrased in absolute terms and that is linked with such fundamental guarantees as the Ex Post Facto and Bill of Attainder Clauses. See, *e.g.*, Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 Case W. Res. L. Rev. 597, 629 (1987) ("We are all familiar with . . . constitutional law evolving into something [different from what] was perhaps originally conceived. But . . . [i]t is quite another [thing] to contemplate a judicial doctrine which has moved 180 degrees from both the original understanding and the first 150 years of our constitutional history"); II B. Schwartz, *A Commentary on the Constitution of the United States* 306 (1965); Note, *A Process-Oriented Approach to the Contract Clause*, 89 Yale L.J. 1623, 1627 (1980) (footnote omitted) ("[i]nterpretation of the clause [has] bec[o]me virtually independent of intent and text"); Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hastings Const. L.Q. 525, 545 (1987) ("The present Court's jurisprudence is at odds with the Framers' interest in providing certainty to those who

enter into contracts, because in evaluating the constitutionality of an impairment the Court has adopted widely differing standards of review and [has] balanced the extent of the impairment against the policy that the state seeks to advance"). See also Hale, *The Supreme Court and the Contract Clause: III*, 57 Harv. L. Rev. 852, 890-91 (1944), quoted in *Allied Structural Steel*, 438 U.S. at 241 n.12; E. Corwin, *The Constitution and What It Means Today* 105 (H. Chase & C. Ducat eds. 1973).

B. The History Of The Drafting Of The Contract Clause Confirms That The Framers Intended The Clause To Be A Strict Prohibition.

1. The history of the Contract Clause confirms what the text and structure of the Constitution reveal. It is a commonplace that the Framers attached great importance to the protection of property rights.[2] In *Federalist* No. 10, perhaps the most important of the *Federalist* papers, Madison stated that "the protection of [the] faculties of acquiring property" is "the first object of government." *Federalist* No. 10 (Madison), at 78 (C. Rossiter ed. 1961). Madison particularly feared the threat to property resulting from "[t]he mutability of the laws of the States." The "injustice" and "evils issuing from" frequent changes in state laws, Madison wrote to Jefferson, "contributed

[2] See, *e.g.*, Schwartz, *Old Wine in Old Bottles? The Renaissance of the Contract Clause*, 1979 Sup. Ct. Rev. 95, 120; McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 Calif. L. Rev. 267, 270 (1988); Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J. Law & Econ. 467, 469-70 (1976); E. Johnson, *The Foundations of American Economic Freedom* 191-92 (1973); J. Nedelsky, *Private Property and the Limits of American Constitutionalism* chs. 2, 5 (1990).

more to the uneasiness which produced the [Constitutional] Convention" than any other inadequacy of the Articles of Confederation. 5 *The Writings of James Madison* 27 (letter of Oct. 24, 1787) (G. Hunt ed. 1904).

The Contract Clause "reflect[s] the high value the Framers placed on the protection of private contracts." *Allied Structural Steel*, 438 U.S. at 245. The Framers viewed the Contract Clause, together with the prohibition against bills of attainder and ex post facto laws, as the "constitutional bulwark in favor of personal security and private rights." *Federalist* No. 44 (Madison), at 282 (C. Rossiter ed. 1961). "The sober people of America," Madison explained, "are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community." *Ibid.*

Charles Pinckney regarded the Contract Clause and the other limitations of Art. I, § 10, Cl. 1 as "the soul of the Constitution." 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 333 (J. Elliott ed. 1881), quoted in McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 Calif. L. Rev. 267, 284 (1988). Justice William Patterson, who had been "an influential member of the Federal Convention" (B. Wright, *The Contract Clause of the Constitution* 20 (1938)) wrote an opinion in an early, important case invalidating a state statute under the Contract Clause and explained: "The preservation of property . . . is a primary object of the social compact." *Vanhorne's Lessee* v. *Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C. Pa. 1795). Roger

Sherman, a member of the Convention from Connecticut, explained to the Governor of Connecticut that the Contract Clause was "necessary as a security to commerce." 3 *Records of the Federal Convention of 1787*, at 100 (Farrand ed. 1911) (hereinafter "Farrand") (letter coauthored by Oliver Ellsworth). And Alexander Hamilton, in another remark typical of the Framers, commented that a law rescinding a state's obligations "may be safely said to be a contravention of the first principles of natural justice and social policy." B. Wright, *supra*, at 22 (citation omitted).

2. Participants in the Philadelphia Convention and in the state ratifying conventions objected to the proposed Contract Clause precisely on the grounds that are today advanced as reasons for interpreting the Contract Clause less than literally. The Framers rejected those arguments and adopted the Contract Clause—which they deliberately phrased as unequivocally as the other provisions of Art. I, § 10, Cl. 1. Moreover, the debates that led to the adoption of the Contract Clause show that the Framers did not see the Clause as simply a way to protect property rights. They believed the Clause was important for an even more fundamental reason: like the Ex Post Facto Clause, it was central to preserving the rule of law and protecting against fundamental unfairness.

a. The first motion to add the Contract Clause to the Constitution was made by Rufus King. 2 Farrand at 439. The motion was opposed by those who believed it would unduly restrict the ability of the states to respond to economic exigencies. See *id.* at 439-40. For example, Gouverneur Morris remarked that King's proposal "would be going too far. There are a thousand laws relating to bringing actions—limitations of actions & which affect contracts." *Id.* at 439. George Mason, anticipating the very language of today's proponents of a "flexible" Contract

Clause, objected: "Cases will happen that can not be foreseen, where some kind of interference will be proper, & essential." *Id.* at 440. During the subsequent ratification debates, Luther Martin attacked the Contract Clause on the ground that "there might be times of such great public calamities and distress . . . as should render it the duty of a government" to interfere with contractual obligations, by "totally or partially stopping the courts" if necessary. 3 Farrand at 214-15 (emphasis omitted).

Madison's statement in the Convention reflected the position that ultimately prevailed: although "inconveniences might arise" from the absolute prohibition against impairing contractual obligations, Madison said, "on the whole [the inconveniences] would be overbalanced by the utility of" the prohibition. 2 Farrand at 440. The turning point of the debate occurred when James Wilson pointed out that, under the proposed Contract Clause, "*retrospective* interferences only are to be prohibited." *Ibid.* (emphasis in original).

In response to Wilson's suggestion, Madison and Edward Rutledge proposed that the purposes of the Contract Clause could be accomplished simply by applying the Ex Post Facto Clause—which, at that point, was drafted to apply only to the federal government—to the states. See 2 Farrand at 440. Rutledge proposed a substitute for King's motion that would prohibit the states from adopting ex post facto laws. That motion carried without further debate. *Ibid.*[3]

[3] Madison's notes reported that Rutledge's motion used the term "retrospective" laws, but according to the Journal of the Convention, which is apparently more accurate on this point, the term was "ex post facto." See B. Wright, *supra*, at 9 n.16.

The next day, John Dickinson reported that, according to Blackstone, "the terms 'ex post facto' related to criminal cases only; that they would not consequently restrain the States from retrospective laws in civil cases, and that some further provision for this purpose would be requisite." 2 Farrand at 448-49. The matter was referred to the Committee on Style, which ultimately reported the Contract Clause in its current form. The Clause was adopted without further reported debate. *Id.* at 619.

These events show that the Framers specifically contemplated that "inconveniences might arise" if the Contract Clause were added to the Constitution. They were urged not to adopt the Contract Clause precisely because it "would be going too far" and because "[c]ases will happen . . . where some kind of interference will be proper, & essential." Despite these arguments the Framers determined to adopt the Contract Clause. Moreover, they regarded the Contract Clause as no less absolute than the Ex Post Facto Clause.

b. The debates also show that the Framers viewed the Contract Clause as protecting the same values that are secured by the Ex Post Facto Clause—which is universally recognized not just as an unequivocal constitutional guarantee but as an essential component of the rule of law. As Madison explained: "Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation." *Federalist* No. 44 (Madison), at 282 (C. Rossiter ed. 1961). Elbridge Gerry sought to apply the Contract Clause to the federal government precisely because preserving contractual obligations was a matter of "public faith." 2 Farrand at 619. And Hamilton summarized the views of many when he stated that laws impairing the obligation of contract are "atro-

cious breaches of moral obligation and social justice." *Federalist* No. 7 (Hamilton), at 65 (C. Rossiter ed. 1961). The Framers did not regard the Contract Clause as merely a matter of " 'economic and social regulation' " (*Energy Reserves Group*, 459 U.S. at 412-13 (citation omitted))—a realm in which flexibility might be appropriate. Instead, they conceived the Contract Clause to be a guarantee of fundamental fairness and the rule of law.

C. The Evolution Of Contract Clause Doctrine Shows That The Current Interpretation Is Unwarranted.

The current state of Contract Clause doctrine is not the result of a considered judgment by the Court that strict enforcement of the Clause will produce harmful results or will otherwise be unworkable. On the contrary, the period during which the Clause was strictly enforced is generally viewed as one in which the economy greatly profited from the stability that the Contract Clause provided. The Contract Clause has evolved to its current state because of a mistaken association between the Clause and a wholly different conception, the notion of economic substantive due process.

For example, the Court has said that in deciding issues under the Contract Clause, courts should "defer to legislative judgment" as "is customary in reviewing economic and social regulation." *United States Trust Co.*, 431 U.S. at 22-23; see also *Energy Reserves Group*, 459 U.S. at 413; *Keystone Bituminous Coal Ass'n*, 480 U.S. at 505. But there is, of course, no uniform standard for reviewing "economic and social regulation." Economic and social regulation that discriminates against suspect groups or threatens First Amendment rights is strictly scrutinized. See, *e.g.*, *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Califano* v.

Goldfarb, 430 U.S. 199 (1977). Similarly, if legislation violates the plain terms of the Contract Clause, it should not be entitled to deference.

The Court's suggestion that a deferential standard of review generally applies in the area of "economic and social regulation" does, however, help explain how the Contract Clause has evolved to its current state. The Court's insistence on "deference" in this area shows an understandable concern that the notion of economic substantive due process not again be used to strike down legislation on the basis of questionable economic theories nowhere found in the Constitution. That now-discredited notion was used most aggressively in the period from approximately the 1890s to the 1930s as a basis for invalidating much regulatory and social welfare legislation. See, *e.g.*, *Allgeyer* v. *Louisiana*, 165 U.S. 578 (1897); *Lochner* v. *New York*, 198 U.S. 45 (1905); *Coppage* v. *Kansas*, 236 U.S. 1 (1915).

The current state of Contract Clause doctrine can be traced to a series of decisions rendered immediately after the demise of economic due process. Those decisions unreflectively treated the Contract Clause and economic due process as aspects of the same bundle of outmoded ideas. They discarded the Contract Clause because economic due process had been discredited. Indeed, the supposed connection between the Contract Clause and economic due process was a theme of the dissent from one of the two decisions in the last half-century in which the Court has invalidated legislation under the Contract Clause. *United States Trust Co.*, 431 U.S. at 60-62 (Brennan, J., dissenting).

The association between the Contract Clause and economic due process is, however, unwarranted. Although both the Contract Clause and economic substantive due

process have something to do with economic and commercial affairs, the Contract Clause differs from economic due process in its scope, its theoretical underpinnings, its effect on the power of states to govern, and, of course, its textual basis in the Constitution.

1. For the first century of the Republic, the Contract Clause "was far more frequently before the Court than any other clause of the Constitution, excepting only the commerce clause." B. Wright, *supra*, at 91-92. See *Allied Structural Steel*, 438 U.S. at 241. The Contract Clause was the primary means by which the Court—dominated for much of this time by Chief Justice Marshall—fostered the development of the emerging American economy. See B. Wright, *supra*, at 28-29; Schwartz, *supra*, 1979 Sup. Ct. Rev. at 98.

The Clause continued to be important during the Taney, Chase, and Waite Courts. See B. Wright, *supra*, at 62-95. Writing near the end of this period, Sir Henry Maine asserted that "in point of fact there is no more important provision in the whole Constitution." He explained that the principle of the Contract Clause "has in reality secured full play to the economical forces by which the achievement of cultivating the soil of the North American Continent has been performed." H. Maine, *Popular Government* 247-48 (1886), quoted in Schwartz, *supra*, 1979 Sup. Ct. Rev. at 97.

2. *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398 (1934), is "the leading case in the modern era of Contract Clause interpretation." *United States Trust Co.*, 431 U.S. at 15. The Court in *Blaisdell* upheld a Minnesota statute that permitted courts to postpone mortgage foreclosure sales of homes and to extend the period of redemption. The reasoning of *Blaisdell* is in many ways

responsible for the modern, lenient interpretation of the Contract Clause. For example, the *Blaisdell* Court explicitly disregarded the plain language of the Contract Clause (290 U.S. at 428), deemed the conjunction of the Contract Clause with the Ex Post Facto and Bill of Attainder Clauses to be irrelevant (*id.* at 426-27), and declared that the history of the Clause was "of little aid" (*id.* at 427).

The *Blaisdell* Court, however, never intended to eviscerate the Contract Clause in the way that subsequent courts believed *Blaisdell* to have done. The Minnesota moratorium was enacted in April 1933, at the depths of the Depression, and the Court in *Blaisdell* emphasized the emergency nature of the legislation. *Id.* at 425, 439-40, 444-45. In addition, the Minnesota statute was, by its terms, to remain in effect "only during the continuance of the emergency and in no event beyond May 1, 1935" (*id.* at 416) and the Court emphasized that the statute was only a "limited and temporary interposition[ ]" that granted only "temporary relief" from a contractual obligation through a "temporary and conditional restraint." *Id.* at 439-40.

Whatever the soundness of allowing a limited exception to the Contract Clause for temporary measures enacted in genuine emergencies—cf. *New York Times Co.* v. *United States*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring) (suggesting that even a prior restraint of political expression might be permitted in cases of "direct, immediate, and irreparable damage")—that is not the same thing as an interpretation of the Clause that would permit an impairment of a contractual obligation whenever a state acts in pursuit of a "significant and legitimate public purpose" by means that can be deemed "reasonable" and "appropriate." Certainly the *Blaisdell* Court did not understand

that decision to have had a dramatic impact on the Contract Clause. A mere four months after *Blaisdell*, in *W.B. Worthen Co.* v. *Thomas*, 292 U.S. 426 (1934), the Court invalidated an Arkansas law under the Contract Clause. Chief Justice Hughes, who wrote the opinion for the Court in *Blaisdell*, wrote the opinion for the Court in *Thomas* as well; he explained that the Arkansas law, unlike the statute upheld in *Blaisdell*, was not intended to deal with an emergency and was "neither temporary nor conditional." *Id.* at 433-34.

A year later, the Court invalidated another Arkansas statute under the Contract Clause. *W.B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56 (1935). Justice Cardozo, a member of the *Blaisdell* majority, wrote the opinion for the Court in *Kavanaugh* and distinguished *Blaisdell* on the same ground: that the statute at issue in *Blaisdell* was carefully limited in duration and in its effects on creditors' rights. *Id.* at 63. See also *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 597-98 (1935) (Brandeis, J.) (invalidating a provision of the federal Bankruptcy Act on retroactivity grounds and distinguishing *Blaisdell*). In *Treigle* v. *Acme Homestead Ass'n*, 297 U.S. 189 (1936), the Court unanimously invalidated a Louisiana statute on Contract Clause grounds and did not even consider it necessary to discuss *Blaisdell*; the Court merely cited *Blaisdell* for the well-established proposition that "the obligations of contracts must yield to a proper exercise of the police power" (*id.* at 197). Finally, in *Wood* v. *Lovett*, 313 U.S. 362 (1941), the Court invalidated a state law, enacted after the sale of state lands, that adversely affected title to the lands.

Thus, as late as 1941, seven years after *Blaisdell*, the Court still enforced the Contract Clause rigorously against state legislation. The *Blaisdell* Court itself did not con-

sider *Blaisdell* to have reduced the Contract Clause to an open-ended balancing test.

3. The lenient modern approach to the Contract Clause, therefore, was not the result of a deliberate decision by the Court to turn sharply away from strict enforcement of the Clause. Instead, the modern view developed in a series of decisions that ignored the limited nature of the holding (as opposed to the dicta) in *Blaisdell* and that did not seriously attempt to explain why dramatically less vigorous enforcement of the Contract Clause was needed. Instead, these decisions casually assimilated the Contract Clause to the doctrine of economic due process and treated the Contract Clause as a relic of a bygone era. See, *e.g.*, *Veix*, 310 U.S. at 41 ("[c]ertainly the protection of building and loan associations against the catastrophe of excessive withdrawal is, today, within legislative power"); *Gelfert* v. *National City Bank*, 313 U.S. 221, 235 (1941) ("[w]e cannot . . . force legislatures to be blind to the lessons which [this] century has taught"); *East New York Bank* v. *Hahn*, 326 U.S. 230, 231-33 (1945). See also *United States Trust Co.*, 431 U.S. at 60-62 (Brennan, J., dissenting).

This conception of the Contract Clause, which treats it as part and parcel of the economic due process era, to be swept away with the demise of that era, cannot be justified. Properly understood, the Contract Clause has little in common with economic due process. That notion was used to promote what was called "freedom of contract." Under this rubric the Court invalidated, for example, maximum hour and minimum wage legislation. *Lochner* v. *New York*, *supra*; *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923). The theory of these decisions was that such legislation unreasonably interfered with the freedom of employees to sell their labor on the terms they chose. This

notion of freedom of contract had, of course, a devastating effect on regulatory legislation.

The Contract Clause was never used to invalidate legislation on this basis. The Contract Clause applies only to *retrospective* legislation—legislation that interfered with contracts already made. It was never used to invalidate legislation that "interfered" with the ability to enter into contracts in the future. This point was settled in *Ogden* v. *Saunders*, 25 U.S. (12 Wheat.) 213 (1827), where the Court explained that the Contract Clause, like the Bill of Attainder and Ex Post Facto Clauses, was designed to protect the rule of law, not broadly to interfere with state legislation. The three Clauses, Justice Johnson said, were "a general provision against arbitrary and tyrannical legislation over existing rights, whether of person or property." *Id.* at 286. Justice Trimble, in a concurring opinion, noted that any other interpretation of the Contract Clause would "transform a special limitation upon the general powers of the States into a general restriction." *Id.* at 322.

The Contract Clause, therefore, is properly understood as a provision comparable to the Ex Post Facto Clause. Like the Ex Post Facto Clause, it leaves ample legislative flexibility to the states. It rests on the core values of the rule of law, not on a highly disputable economic theory. And the Contract Clause, unlike the notion of economic due process, is an explicit and unequivocal constitutional command.

The regime of economic due process and "freedom of contract" interpreted the Due Process Clause in a way that bore no relation to its meaning, history, or structural position in the Constitution. In this respect, the true successor to economic due process today is the overly flexible interpretation of the Contract Clause—not the interpreta-

tion we propose, which would carry out the plain language and the Framers' intentions. Because the current state of Contract Clause doctrine is based on an unreflective and unjustifiable view of the Clause, and because that doctrine is inconsistent with the plain meaning and the history of the Contract Clause, the Court should reconsider the doctrine and restore the Contract Clause to the status it held, with beneficial consequences, for 150 years of the nation's history.

CONCLUSION

The judgment of the Michigan Supreme Court should be reversed.

Respectfully submitted.

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